



Federal Communications Commission
Washington, D.C. 20554

March 13, 1997

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FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF SECRETARY

Daniel J. Popeo, Esq.
Paul D. Kamenar, Esq.
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Popeo and Mr. Kamenar:

I am writing in response to your request that I recuse myself from participation in that portion of the 220-222 MHz rulemaking proceeding (PR Docket No. 89-552; GN Docket No. 93-252; PP Docket No. ~~93-253~~) which examines various methods for assigning certain frequencies which are the subject of the rulemaking. In particular, your petition asserts that comments I made at an open Commission meeting, as well as at a public speaking engagement, establish that I am unable to give meaningful consideration to comments submitted on the method of allocating one subset of the 220 MHz licenses. Having reviewed both the statements which concern you and the law governing recusals in the administrative rulemaking context, I find that these statements are far from establishing that I have an "unalterably closed mind" on matters relevant to this or any portion of the 220 MHz rulemaking. As such, I decline to recuse myself from participation in this proceeding.

The appropriate standard for reviewing a recusal request in an administrative rulemaking procedure was established by the D.C. Circuit in *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The court wrote:

An agency member may be disqualified from [a rulemaking] proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking.

Id. at 1154. Rejecting the prejudgment standard applied to adjudicatory proceedings in *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), the court drew a firm distinction between agency decisionmakers in their adjudicatory and legislative (or rulemaking) roles. Recognizing that the factual components of policy decisions are not simply assessed as "empirically verifiable condition[s]", the court cautioned against unduly restricting a decisionmaker's inquiry and the natural exchange of ideas.

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The legitimate functions of a policymaker, unlike an adjudicator, demand interchange and discussion about important issues. We must not impose judicial roles upon administrators when they perform functions very different from those of judges. . . . The *Cinderella* view of a neutral and detached adjudicator is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies.

Id. at 1168-69.

Your recusal request concerns my participation in the Section 309(j) portion of the rulemaking proceeding initiated in the Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking in the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by Private Land Mobile Radio Service (released Aug. 28, 1995) (Third NPRM). Specifically, your petition concerns that portion of the rulemaking which seeks comment on the method of disposition of thirty-three pending applications for nationwide, non-commercial licenses in the 220-222 MHz band: random selection, comparative hearing, or competitive bidding. In relevant part, the Third NPRM asks for comment on its "tentative conclusion" that "the principal use of the 30 channels allocated for nationwide use is most likely to be for the transmission or reception of communications signals to subscribers for compensation and therefore, in accordance with Section 309(j)(2)(A) of the Communications Act, mutually exclusive applications for initial licensing of these channels should be assigned by competitive bidding." Third NPRM at ¶ 36.

In your petition, you allege that a "reasonable person [would] conclude that Chairman Hundt has already decided to vote for an auction in these proceedings . . . and that he will not or could not give meaningful consideration to public comments which are to the contrary." Petition at 6. These allegations are premised upon remarks that I made during two public appearances: at the open commission meeting on July 28, 1995, at which the Third NPRM was adopted, and at a public address that I gave at Phillips Business Information, Inc., on August 25, 1995.

First, you state that several of my comments at the open meeting demonstrate "that [my] mind has been made up in favor of holding an auction in these proceedings." Petition at 7. Primarily, you point to comments in which I questioned the phrasing of the NPRM, suggesting instead that the document should more clearly state a position or tentative conclusion. NPRMs are generally intended to offer alternatives, to proffer a tentative conclusion, and to solicit comments in response that will permit the Commission to modify, refine, or retain its tentative conclusion as appropriate in response. Thus, my remarks were

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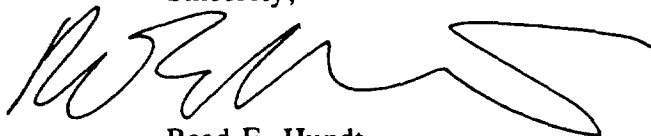
intended merely to reflect my preliminary views on this issue. Other comments that you cite in your petition -- concerning the comparative features of lotteries, comparative hearings, and competitive bidding -- merely note a few of the myriad issues to be addressed by commenters. The content of the comments does not suggest that I am unable or unwilling to fully consider comments advocating any particular approach.

Second, you suggest that my announcement, at Phillips Business Information, Inc., of tentative auction dates for 1996, further supports a conclusion that my mind "has been made up." Most fundamentally, you mistake the contingent and highly general nature of that announcement. Not only was the reference to 220 MHz auctions fleeting, but the list of proposed auction dates included all *potential* services to be licensed. The announcement merely contained my understanding of auction dates for the services, in the event that they were to be auctioned. As you can certainly understand, because of the administrative resources required to conduct auctions, the Commission must begin to plan for them well in advance of any final Commission decision to authorize them. Thus I also announced a tentative date for the Broadband C Block auction, which was then subject to a stay by the United States Court of Appeals.

I believe that these comments are far from establishing, by clear and convincing evidence, that I have an "unalterably closed mind" concerning the treatment of pending applications in the rulemaking proceeding. I take most seriously any allegation of bias or of predisposition, and so I have addressed your petition at length and assessed the challenged remarks against the proper legal standard. Yet leaving the legal standard aside, I will approach this rulemaking as I approach any issue before the Commission: with an open mind and a willingness to consider all factual, legal, and policy arguments properly presented in the record.

For the foregoing reasons, I deny your petition to recuse myself from participation in the Section 309(j) portion of the 220 MHz rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read 'Reed E. Hundt', with a stylized, sweeping flourish at the end.

Reed E. Hundt
Chairman